IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC95094
	)	
CLAUDE CHAMBERS,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF CRAWFORD COUNTY, MISSOURI
42ND JUDICIAL CIRCUIT, DIVISION 2
THE HONORABLE KELLY W. PARKER, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

Margaret M. Johnston, MOBar #45913
Attorney for Appellant
Woodrail Centre
1000 West Nifong
Building 7, Suite 100
Columbia, Missouri 65203
Telephone (573) 777-9977
FAX (573) 777-9974
maggie.johnston@mspd.mo.gov

INDEX

TABLE OF AUTHORITIES

Page

CASES:

Page

***CONSTITUTIONAL PROVISIONS*:**

Page

***STATUTES*:**

***RULES*:**

JURISDICTIONAL STATEMENT

Appellant Claude Chambers appeals his conviction by a Crawford County jury for first-degree statutory sodomy, § 566.062, RSMo Supp. 2006.[1] He was sentenced as a persistent felony offender by the Honorable Kelly W. Parker to a thirty-year term of imprisonment.

On direct appeal to the Missouri Court of Appeals, Southern District, Mr. Chambers' conviction was reversed and his case remanded for a new trial in a new venue. This Court granted the state's application for transfer of the case to this Court under Rule 83.04.

[1] Statutory references are to the Revised Statutes of Missouri, 2000, unless otherwise noted. Rule references are to Missouri Supreme Court Rules (2015). The record on appeal contains a legal file (LF) and transcript (Tr.).

STATEMENT OF FACTS

In March of 2013, Appellant Claude Chambers was charged by Information in Crawford County with one count of first-degree statutory sodomy, § 566.062 (LF 7). The charge alleged that between January 1, 2010 and January 1, 2011, Mr. Chambers had deviate sexual intercourse with CR, who was less than twelve years old, by putting an object in CR's anus (LF 7).

The morning of trial, Mr. Chambers waived his right to the assistance of counsel (Tr. 63-73; LF 27), and was arraigned on an Amended Information that alleged him to be a persistent felony offender (Tr. 73-75; LF 9). The court found beyond a reasonable doubt that Mr. Chambers was a prior and persistent offender (Tr. 77). Mr. Chambers waived his right to be present at trial and left the courtroom; the trial proceeded in his absence (Tr. 77).

CR testified that he is ten years old and the son of Yvonne Chambers (Tr. 116). In 2010, he lived with his mother and her husband, Mr. Chambers, in an apartment in Cuba, Missouri (Tr. 116-117, 124, 130). CR testified that Mr. Chambers got him up and ready for school most of the time (Tr. 117). He testified that Mr. Chambers made him watch "nasty movies" where "girls do other stuff nasty to other girls" (Tr. 117). While

that was going on, Mr. Chambers pulled down his pants and told CR to do the same, and then he made CR sit on his lap (Tr. 118). CR testified that Mr. Chambers' "wiener" went inside of him (Tr. 118). Mr. Chambers told him to keep it a secret, but CR told his teacher, Ms. Jackson, what happened (Tr. 118-119).

Angela Jackson testified that she is a teacher at Cuba Elementary and CR was her student (Tr. 120). Because he had "a rough time" at home, Ms. Jackson began watching CR at her home every other weekend on a regular basis, and they became close (Tr. 121). CR told Ms. Jackson that Mr. Chambers would make him watch movies, and said that Mr. Chambers put "it" (pointing down to himself in the front) in (pointing to his bottom) (Tr. 122). Ms. Jackson told CR's mother and law enforcement; it was quite some time before law enforcement became involved (Tr. 122).

Yvonne Chambers testified that CR is her son (Tr. 123). Mr. Chambers got CR up for school sometimes while Ms. Chambers remained in bed (Tr. 123). She had no idea what happened during those times (Tr. 123-124). Ms. Chambers testified that she no longer has custody of CR (Tr. 124). She testified that when Ms. Jackson told her what CR said Mr. Chambers did to him, CR was in foster care, so she called a caseworker (Tr. 124).

Sarah Nowak testified that she interviewed CR at the Children's Advocacy Center on February 16, 2011, on a referral that he was sexually abused (Tr. 127). During the interview, CR disclosed that when he was in first grade, Mr. Chambers made CR sit on his lap and Mr. Chambers put his penis into CR's "butt" (Tr. 129-130). The interview was recorded, and State's Exhibit 4 contains the recording (Tr. 125-126, 130-131). It was played for the jury (Tr. 131).

In the interview, CR told Ms. Nowak that Mr. Chambers put his "bad spot" (penis) into CR's "butt" (State's Ex. 4). It happened when CR was in first grade and they were living in Cuba in a brick house (State's Ex. 4). CR said that it happened before the fire; CR said he had to burn the place down because of Mr. Chambers (State's Ex. 4).

The state rested (Tr. 132), the jury was instructed (Tr. 134-137), and the state presented argument (Tr. 137-140). The jury deliberated and returned a verdict of guilty; they were polled and excused (Tr. 144-147; LF 36). Mr. Chambers was brought to court and the court announced the verdict (Tr. 147).

Mr. Chambers filed a timely motion for judgment of acquittal or for a new trial (LF 4-5, 37-39). In his motion, Mr. Chambers alleged trial court error in overruling his application for a change of venue, and in overruling

his motion for continuance, amended motion for continuance, and second amended motion for continuance (LF 37-38, claims 1&2). The motion was denied; Mr. Chambers was sentenced to a term of thirty years of imprisonment (LF 40-41).[2]

On direct appeal to the Missouri Court of Appeals, Southern District, Mr. Chambers' conviction was reversed and his case remanded for a new trial after transfer to a new venue. ***State v. Chambers***, SD33243 (Mo. App. S.D. May 18, 2015). The Court of Appeals did not address Mr. Chambers' remaining claims of error, finding that they were moot or could be addressed on remand. ***Id.*** at *3.

This Court granted Respondent's application for transfer of the case to this Court pursuant to Rule 83.04. Mr. Chambers renews all claims presented to the Court of Appeals; additional facts necessary to the disposition of the issues raised on appeal are presented in the argument portion of the brief.

---

[2] There is no docket sheet entry or on-the-record ruling of Mr. Chambers' motion. The motion is deemed to be overruled ninety days after its filing. ***Rule 81.05(a)(2)(A).***

POINTS RELIED ON

I.

The trial court erred in overruling Mr. Chambers' motion for judgment of acquittal or a new trial, and in entering judgment and sentence on the jury's guilty verdict for first-degree statutory sodomy, § 566.062, because the State did not prove beyond a reasonable doubt the offense as charged in the information, in violation of Mr. Chambers' rights to due process, a fair trial, to be tried only for the offense with which he is charged, and to be free from double jeopardy as guaranteed by the 5th, 6th, and 14th Amendments to the U.S. Constitution and Art. I, §§ 10, 17, 18(a), and 19 of the Missouri Constitution, in that Mr. Chambers was charged with "putting an *object* in the anus of C.R.," but the only evidence presented at trial was that Mr. Chambers put his *penis* in CR's anus, and since these are two distinct manners of committing deviate sexual intercourse, both of which may be charged as separate offenses, Mr. Chambers is placed in jeopardy of being twice convicted for the same act if this conviction is allowed to stand; because the state did not prove the act it elected to charge, there was insufficient evidence to support Mr. Chambers' conviction and it should be reversed.

In re Winship, 397 U.S. 358 (1970);

State v. Follin, 829 S.W.2d 90 (Mo. App. E.D. 1992);

State v. Clay, 909 S.W.2d 711 (Mo. App. W.D. 1995);

State v. Miller, 372 S.W.3d 455 (Mo. banc 2012);

U. S. Const., Amends. 5, 6 & 14;

Mo. Const., Art. I, §§ 10, 17, 18(a), & 19;

§§ 566.010 & 566.062; and

Rule 29.11.

II.

The trial court erred in overruling Mr. Chambers' application for a change of venue filed pursuant to Rule 32.03, because the court's ruling violated Rule 32.03 and Mr. Chambers' rights to due process and a fair trial by an impartial jury guaranteed by the 14th Amendment to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution, in that Mr. Chambers timely filed an application for a change of venue the day he was arraigned, but the court never ruled on the motion, and when the motion was brought to the trial court's attention the day before the first trial setting in the case, the court ruled that Mr. Chambers "waived" his right to a change of venue by not bringing the motion to the court's attention sooner, but Mr. Chambers did not waive his right because trial had not yet commenced when the motion was raised.

State v. Bradshaw, 81 S.W.3d 14 (Mo. banc 2002);

Moss v. State, 10 S.W.3d 508 (Mo. banc 2000);

Matthews v. State, 175 S.W.3d 110 (Mo. banc 2005);

United States Constitution, Amendment 14;

Mo. Constitution, Article I, §§ 10 & 18(a); and

Rules 29.11 & 32.03.

III.

The trial court abused its discretion in overruling Mr. Chambers' motion for a continuance, because the ruling violated Mr. Chambers' rights to due process, a fair trial, to present a defense, and to the effective assistance of counsel, guaranteed by the 5th, 6th and 14th Amendments to the United States Constitution, and Article I, §§ 10 and 18(a) of the Missouri Constitution, in that the court's ruling was clearly illogical, arbitrary, and unreasonable because the motion was filed three weeks before the first trial setting and counsel demonstrated diligence toward proceeding to trial by asking the court to delay ruling on the motion until after depositions, but the depositions produced testimony by CR inconsistent with his CAC interview, and counsel learned of: undisclosed Children's Division records that might rebut the inference that CR's "bad behavior" was solely the result of sexual abuse; evidence that CR was not taking his prescribed medication during the alleged period; evidence of alleged physical and daily sexual abuse of CR and fire-setting by CR for which counsel required expert assistance; and the names of several witnesses, provided to the court, that counsel still had not located or interviewed – Mr. Chambers was prejudiced by the court's ruling because he was deprived of the opportunity to investigate and

potentially present to the jury this evidence that bore directly on CR's credibility and whether the alleged act was committed.

State v. Smith, 292 S.W.3d 595 (Mo. App. S.D. 2009);

State v. Sherrell, 198 S.W. 464 (Mo. App. Spr. D. 1917);

State v. Sutherland, 436 S.W.3d 645 (Mo. App. E.D. 2014);

State v. Lucas, 218 S.W.3d 626 (Mo. App. S.D. 2007)***;***

U. S. Const., Amends. 5, 6 & 14;

Mo. Const., Art. I, §§ 10 & 18(a); and

Rule 29.11.

ARGUMENT

I.

The trial court erred in overruling Mr. Chambers' motion for judgment of acquittal or a new trial, and in entering judgment and sentence on the jury's guilty verdict for first-degree statutory sodomy, § 566.062, because the State did not prove beyond a reasonable doubt the offense as charged in the information, in violation of Mr. Chambers' rights to due process, a fair trial, to be tried only for the offense with which he is charged, and to be free from double jeopardy as guaranteed by the 5th, 6th, and 14th Amendments to the U.S. Constitution and Art. I, §§ 10, 17, 18(a), and 19 of the Missouri Constitution, in that Mr. Chambers was charged with "putting an *object* in the anus of C.R.," but the only evidence presented at trial was that Mr. Chambers put his *penis* in CR's anus, and since these are two distinct manners of committing deviate sexual intercourse, both of which may be charged as separate offenses, Mr. Chambers is placed in jeopardy of being twice convicted for the same act if this conviction is allowed to stand; because the state did not prove the act it elected to charge, there was insufficient evidence to support Mr. Chambers' conviction and it should be reversed.

Standard of Review & Preservation

The due process clause protects a defendant against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. ***In re Winship***, 397 U.S. 358, 364 (1970). In reviewing a challenge to the sufficiency of the evidence, this Court accepts as true all evidence, and the reasonable inferences drawn from it, in a light most favorable to the verdict. ***State v. Silvey***, 894 S.W.2d 662, 673 (Mo. banc 1995). This Court disregards contrary inferences unless they are such a natural and logical extension of the evidence that a reasonable juror would be unable to disregard them. ***State v. Grim***, 854 S.W.2d 403, 411 (Mo. banc 1993). But this Court may not supply missing evidence or give the State the benefit of unreasonable, speculative or forced inferences. ***State v. Whalen***, 49 S.W.3d 181, 184 (Mo. banc 2001). This same standard of review applies when this Court reviews a motion for a judgment of acquittal. ***State v. Botts***, 151 S.W.3d 372, 375 (Mo. App. W.D. 2004).

Mr. Chambers chose to represent himself at trial, and chose to be absent during trial, so no motion was filed at the close of the state's evidence, and no defense was presented. In Mr. Chambers' motion for a new trial, he alleged that the trial court erred in allowing the case to go to

the jury because the evidence presented at trial was legally insufficient to support a guilty verdict (LF 38-39, claim 4). Mr. Chambers alleged that this error denied him his rights to due process, a fair trial, to be tried only for the offense with which he was charged, and to be free from double jeopardy (LF 39, claims 4 and 5).[3] Errors alleging that the evidence is insufficient to sustain the conviction need not be included in the motion for a new trial to be preserved for appeallte review; this issue is properly preserved for appeal. ***Rule 29.11(d)(3).***

Discussion

Mr. Chambers was charged by amended information with first-degree statutory sodomy, ***§ 566.062*** (LF 9). Statutory sodomy in the first degree is committed if a person has deviate sexual intercourse with another person who is less than fourteen years old. ***Id.*** "Deviate sexual intercourse" means any act involving the genitals of one person and the hand, mouth, tongue, or anus of another person, or a sexual act involving the penetration, however slight, of the male or female sex organ or the anus by a finger, instrument, or object done for the purpose of arousing or gratifying the sexual desire of any person or for the purpose of terrorizing the victim. ***§ 566.010(1).*** The charge here alleged that on or about between

[3] U. S. Const., Amends. 5, 6, & 14; Mo. Const., Art. I, §§ 10, 17, 18(a) & 19.

January 1, 2010 and January 1, 2011, Mr. Chambers had deviate sexual intercourse with CR, who was less than twelve years old, by knowingly putting "an object" in CR's anus (LF 9).

The Missouri Constitution provides that no person shall be prosecuted criminally otherwise than by indictment or information. ***Mo. Const. Art. I, § 17***. It also provides that in criminal prosecutions, the accused shall have the right to demand the nature and cause of the accusation. ***Mo. Const. Art. I, § 18(a)***.

Where the act constituting the crime is specified in the charge and the verdict director, the State is held to proof of that act, and a defendant may be convicted only of that act. ***State v. Jackson***, 896 S.W.2d 77, 82-83 (Mo. App. W.D. 1995). As this Court has recently reaffirmed, as a matter of due process, a criminal defendant is entitled to notice of the charges against him and may not be convicted of any offense of which the information or indictment does not give him fair notice. ***State v. Miller***, 372 S.W.3d 455, 466-467 (Mo. banc 2012). The State is required to prove the offense it charged, not the one it might have charged. ***Id***. The United States Supreme Court has held similarly. *See,* ***Cole v. Arkansas***, 333 U.S. 196, 201 (1948) ("No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard

in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal;" "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made.").

Here, the state's evidence did not establish beyond a reasonable doubt that the alleged act occurred; rather, the state's evidence proved that a different act occurred. CR testified that Mr. Chambers put his "wiener" inside of him (Tr. 118). The CAC interviewer testified that CR told her that Mr. Chambers put his penis into CR's "butt" (Tr. 129-130). The CAC tape reveals CR saying that Mr. Chambers put his "bad spot" into CR's butt; "bad spot" was CR's name for the penis (State's Ex. 4). There was no evidence that Mr. Chambers put an "object" into CR's anus as alleged in both the amended information and in Instruction No. 5, the verdict director (LF 9, 33). The instruction read:

Instruction No. 5

If you find and believe from the evidence beyond a reasonable doubt:

First, that on or about and between Janaury [sic] 1, 2010, and

January 1, 2011, in the County of Crawford, State of Missouri, the defendant knowingly put an object in the anus of [CR], and

Second, that such conduct constituted deviate sexual intercourse, and

Third, that at that time [CR] was less than twelve years old,

then you will find the defendant guilty of statutory sodomy in the first degree.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

As used in this instruction, the term "deviate sexual intercourse" means any act involving the genitals of one person and the hand, mouth, tongue, or anus of another person or a sexual act involving the penetration, however slight, of the male or female sex organs or the anus by a finger, instrument or object done for the purpose of arousing or gratifying the sexual desire of any person.

(LF 33).

Obviously, there are many permutations of "deviate sexual intercourse" that may be charged. Here, the state did not elect to charge that Mr. Chambers committed an act involving CR's anus and Mr. Chambers' penis. Rather, the state elected only to charge that Mr. Chambers put an "object" in CR's anus (LF 9). This is a different offense. The specificity in the verdict director prevented the jury from finding Mr. Chambers guilty of any sodomy not involving Mr. Chambers putting an "object" in CR's anus. *See* ***State v. Edwards***, 365 S.W.3d 240, 247 (Mo. App. W.D. 2012)(where victim testified to multiple acts of sodomy, state's election of particular criminal act in verdict director language prevented jury from finding guilt on any act not involving the act specified in the verdict director).

When the words of a statute are clear, this Court should apply the plain meaning of the law. ***State v. Myers***, 386 S.W.3d 786, 794 (Mo. App. S.D. banc 2012). Statutory definitions should be followed in interpreting the statute. ***Id.*** This Court does not have the authority to read into a statute a legislative intent that is contrary to the statute's plain and ordinary meaning. ***Id.*** As applied to the definition of "deviate sexual intercourse," a "penis" is something different than an "object." Were the

two items the same, only one would be named in the statute; but since they are different things, proof of one is not proof of the other.

The state did not amend the charge to conform to the evidence presented at trial, although it could have easily done so. ***State v. Smith***, 242 S.W.3d 735, 742 (Mo. App. S.D. 2007) (under Rule 23.08, an information may be amended at any time before a verdict if no additional or different offense is charged and a defendant's substantial rights are not thereby prejudiced). Rather, the state charged that Mr. Chambers put an object into CR's anus, but proved something different. This error is fatal to Mr. Chambers' conviction.

In ***State v. Follin***, 829 S.W.2d 90, 91 (Mo. App. E.D. 1992), the state charged the defendant with sodomy for having deviate sexual intercourse with the victim by rubbing her vagina with his penis. The verdict director instructed the jury to find the defendant guilty of sodomy if he rubbed the victim's vagina with his penis. ***Id.*** At the time, deviate sexual intercourse was defined as "any sexual act involving the genitals of one person and the mouth, tongue, hand or anus of another person." ***Id.*** The ***Follin*** Court found insufficient evidence to support the defendant's conviction as charged and reversed the conviction; Follin's conduct did not involve the mouth, tongue, hand or anus. ***Id.***

The ***Follin*** Court noted that the defendant might arguably have been guilty of sexual abuse in the first degree, but was not charged with that offense. ***Id.*** At the time of the alleged incident, sexual abuse in the first degree was committed in two ways, including the defendant subjecting another person less than twelve years old to sexual contact. ***§ 566.100, RSMo 1979.*** The victim in ***Follin*** was between six and nine years old at the time of the abuse. ***Follin***, 829 S.W.2d at 91. "Sexual contact," as defined at that time, included any touching of the genitals or anus of any person. ***§ 566.010.1(3), RSMo 1987.*** Thus, the defendant's rubbing of the victim's vagina with his penis might have been sexual abuse in the first degree, but it was not sodomy. The ***Follin*** decision highlights that the way offenses are defined, charged, and instructed upon matters when determining the sufficiency of the evidence to support a verdict.

In ***State v. Clay***, Clay was convicted of the sodomy of his ten year-old daughter for engaging in "deviate sexual intercourse" with her. 909 S.W.2d 711 (Mo. App. W.D. 1995). At the time, "deviate sexual intercourse" was defined as "any sexual act involving the genitals of one person and the mouth, tongue, hand or anus of another person." ***Id.*** At trial, evidence was presented that Clay held a hand-carved, wooden, penis-shaped object in his hand and inserted it into his daughter's vagina,

manipulating the object in and out of her vagina with his hand. ***Id.*** at 713. On direct appeal, Clay challenged the sufficiency of the evidence to support his conviction for sodomy, arguing that the wooden object was not a "mouth, tongue, hand or anus," and hence his using it on his daughter's vagina did not meet the definition of "deviate sexual intercourse." ***Id.*** at 714. Clay argued that the crime of sodomy required him to insert his hand or fingers – rather than a wooden object – into his daughter's vagina. ***Id.*** But the ***Clay*** Court found that the evidence and allowable inferences from it revealed that Clay grasped the wooden, penis-shaped object at one end and manually inserted it into his daughter's vagina; he then manipulated the object in and out of her vagina *with his hand*. ***Id.*** The Court found that Clay's actions "involved" both the object and his hand, and so his conduct met the definition for "deviate sexual intercourse." ***Id.*** It was a sexual act involving her genitals and his hand.

The definition of "deviate sexual intercourse" had changed by the time of the acts alleged in Mr. Chambers' case. It could be committed in one of two ways: either 1) act involving the genitals of one person and the hand, mouth, tongue, or anus of another person, or 2) a sexual act involving the penetration, however slight, of the male or female sex organ or the anus by a finger, instrument, or object done for the purpose of

arousing or gratifying the sexual desire of any person or for the purpose of terrorizing the victim. ***§ 566.010(1).*** Mr. Chambers was charged under the second definition; the state alleged that he knowingly put an object in CR's anus (LF 9). In ***Clay***, Mr. Clay was charged under the first defintion and argued that the state's evidence did not prove the elements of the offense. He argued that his hand, mouth, tongue or anus never touched the victim's genitals. But the court found that the definition required only that Mr. Clay's hand be "involved" in the act, and that it did not necessarily have to touch the victim's genitals. Because his hand was involved in the act involving her genitals, the evidence was sufficient to prove deviate sexual intercourse as charged. However in Mr. Chambers' case, the state did not prove the act charged; there was no evidence that CR's anus was penetrated by a finger, instrument, or object.

In ***Miller***, *supra*, this Court dealt with an issue concerning the "Sufficiency of the Evidence to Prove the Charges Included in the Information and [Two Verdict Directors]." ***Miller***, 372, S.W.3d at 462-463. Miller argued that the State failed to prove he engaged in two charged sex offenses because "there was no evidence that he committed these crimes consistent with the dates alleged in both the information setting forth the charges and the jury instructions." ***Id***. at 463. The information and two

verdict directors charged that the acts occurred between specific ranges of dates, but the evidence showed that the same type of sex acts occurred between a different range of dates. ***Id***. at 463.

The State argued that since time was not of the essence, it did not have to prove the acts occurred on the charged dates, and thus the evidence was sufficient to convict Miller despite the disparity in the dates listed in the information and jury instructions and the dates coinciding with the evidence adduced at trial. ***Id***. at 464.

This Court disagreed with the State and held that there "was insufficient evidence Miller committed the charged offenses … during the charged period," reversed those two convictions, and remanded for entry of judgments of acquittal as to those two counts. ***Id***. at 468. The Court held that due process requires that a defendant may not be convicted of an offense not charged in the information or instructed upon, and that the state is required to prove what it charged, not what it might have charged. ***Miller***, 372 S.W.3d at 467.

The ***Miller*** Court also ruled that the double jeopardy clause precludes a remand for a second trial when a conviction is reversed because of insufficient evidence at trial. ***Id.*** at 468. In criminal child abuse cases, the state is granted greater leeway in charging that the crimes took

place within a fairly broad time frame. But the *quid pro quo* is that the state must prove what it charges. ***Miller***, *supra*.

Just as the time charged was fatal to Miller's conviction, the act charged here and the state's failure to prove it beyond a reasonable doubt is fatal to Mr. Chambers' conviction. The state *could have charged* a different form of deviate sexual intercourse; the state could have charged that Mr. Chambers committed an act involving his genitals and CR's anus, and Mr. Chambers would have prepared his defense to that particular charge. But the state instead charged that Mr. Chambers put an object in CR's anus, and instructed the jury that it must find that Mr. Chambers knowingly put an object in CR's anus in order to find him guilty of statutory sodomy in the first degree. There was no such evidence. The state failed to prove beyond a reasonable doubt what it charged, and Mr. Chambers cannot be convicted of the offense. As in ***Follin*** and ***Miller***, because there was insufficient evidence proving that Mr. Chambers committed the act charged, he is entitled to a reversal of his conviction and discharge.

II.

The trial court erred in overruling Mr. Chambers' application for a change of venue filed pursuant to Rule 32.03, because the court's ruling violated Rule 32.03 and Mr. Chambers' rights to due process and a fair trial by an impartial jury guaranteed by the 14th Amendment to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution, in that Mr. Chambers timely filed an application for a change of venue the day he was arraigned, but the court never ruled on the motion, and when the motion was brought to the trial court's attention the day before the first trial setting in the case, the court ruled that Mr. Chambers "waived" his right to a change of venue by not bringing the motion to the court's attention sooner, but Mr. Chambers did not waive his right because trial had not yet commenced when the motion was raised.

Facts

In March of 2013, Mr. Chambers was charged by Information in Crawford County with one count of first-degree statutory sodomy, § 566.062 (LF 7). The charge alleged that between January 1, 2010 and January 1, 2011, Mr. Chambers had deviate sexual intercourse with CR, who was less than twelve years old, by putting an object in CR's anus (LF

7). An Amended Information alleged Mr. Chambers to be a persistent felony offender (LF 9).

On March 19, 2013, Mr. Chambers appeared in person and with counsel, Michael Younker (LF 2). Mr. Chambers waived formal arraignment and filed an application for a change of venue pursuant to Missouri Supreme Court Rule 32.03 (LF 2, 8).[4] All pending motions were set for a hearing on April 16 (LF 2).

On April 16, Mr. Chambers appeared with different counsel, Mark Evans (LF 2). The hearing was brief; the case was continued to May 22, 2013 for a § 491.075 hearing (Tr. 5-6; LF 2). The hearing was held as planned, and a June 19, 2013 "case review" was scheduled for the court's ruling on the evidence presented (LF 2). At the June 19, 2013 hearing, the case was scheduled for a jury trial on December 9, 2013; Mr. Chambers' case was third on the trial docket (LF 2). The court also scheduled a November 19, 2013 appearance "to hear all pending motions and for last date to enter negotiated plea" (LF 2).

---

[4] Appellant's Appendix contains the version of Rule 32.03 that became effective January 1, 2014. The January 1, 2014 change was the addition of subsection (d), which does not affect the issue raised here. *See* ***Rule 32.03.***

On November 14, Mr. Chambers filed a notice of deposition of eight state witnesses; the depositions were scheduled for November 21 (LF 10-11). He filed a motion for a trial continuance on November 18 (LF 12-13). At the scheduled November 19 hearing, counsel reminded the court that depositions were in two days and said the court could delay ruling on the continuance request; the court asked, "So cause is to remain for trial?" and counsel replied, "Yes" (Tr. 41).

On December 5, four days before the December 9 trial, counsel Evans filed an Amended Motion for Continuance (LF 14-18). In the motion, counsel detailed information revealed in the November 21 depositions that required further investigation by counsel to prepare the case for trial (LF 15-17). A telephone conference was held on Thursday, December 5, 2013 on Mr. Chambers' motion for a continuance; the court overruled the motion (Tr. 42, 45). Later that day, Mr. Chambers faxed to the court correspondence stating, "Judge I'm firing Mark Evans for inneffective [sic] assistance council [sic]" (LF 19; Tr. 45).

The next appearance was the morning of trial, Monday, December 9, 2013 (Tr. 42). Before the venire was brought into the courtroom (Tr. 77), a pre-trial hearing was held on the record (Tr. 42). The court noted that on Sunday afternoon, December 8, counsel Evans called the court and notified

the court that Mr. Chambers' former attorney had filed an application for a change of venue on March 19, 2013, that was never ruled on (Tr. 45; LF 8).[5] The motion was filed, pursuant to Rule 32.03, within ten days of Mr. Chambers' arraignment (LF 2, 8). Counsel requested that the court order the change of venue (Tr. 45). The court stated that it contacted the prosecuting attorney that evening, and the prosecutor suggested that they wait until the morning of trial to discuss the matter on the record (Tr. 45).

Counsel Evans told the court that ***Matthews v. State***, 175 S.W.3d 110 (Mo. banc 2005), is dispositive; under Rule 32.03, if a timely application for a change of venue is filed, the court shall immediately order the case transferred to some other county (Tr. 46). The prosecuting attorney argued that Mr. Chambers waived his right to a change of venue "when they set it for trial here in Crawford County" (Tr. 47). The court agreed, and said that by remaining silent when the case was set for trial, Mr. Chambers waived his right to a change of venue (Tr. 47). Additionally, a motion hearing was held June 19 for the court to hear all pending motions, and counsel Evans did not bring up the pending change of venue motion, so it was waived

[5] Appellant's legal file index incorrectly titles this motion, "Defendant's Application for Change of Judge" (LF Index). The motion is actually titled "Application for Change of Venue" (LF 8).

(Tr. 47). The trial court ruled, "This court does find that by silence and by not affirmatively bringing that matter to the court's attention the defendant waived his right to a change of venue in this case. …[T]he change of venue is denied at this time because the court finds it has been waived (Tr. 47-48).

In his timely motion for judgment of acquittal or a new trial, Mr. Chambers alleged trial court error in overruling his application for a change of venue filed under Rule 32.03 (LF 4-5, 37). ***Rule 29.11(b)***. He alleged that he did not waive his right to a change of venue, and its denial deprived him of his rights to due process and a fair trial by an impartial jury (LF 37).[6] The motion was overruled; Mr. Chambers was sentenced to thirty years of imprisonment (LF 42-43).[7] Mr. Chambers' claim is preserved for appeal. ***Rule 29.11(d).***

Standard of Review

The plain language of ***Rule 32.03*** entitles a defendant to a change of venue as a matter of right without any showing of cause. ***Matthews v.***

---

[6] U.S. Const., Amend. 14; Mo. Const., Art. I, §§ 10 and 18(a).

[7] There is no docket sheet entry or on-the-record ruling of Mr. Chambers' motion. The motion is deemed to be overruled ninety days after its filing. ***Rule 81.05(a)(2)(A).***

State, 175 S.W.3d at 113-114. The trial court does not have the discretion to deny such a motion for a change of venue. ***Matthews v. Purkett***, 2009 WL 2982912 at *7 (E.D. Mo. 2009), *citing* ***Moss v. State***, 10 S.W.3d 508, 513 (Mo. banc 2000).[8] Missouri case law clearly establishes that a properly-preserved claim of error under Rule 32.03 requires automatic reversal. ***Purkett***, 2009 WL 2982912 at *7, *citing* ***State v. Bradshaw***, 81 S.W.3d 14, 27 (Mo. App. W.D. 2002). If a trial court's failure to grant a change of venue is raised on direct appeal, the appellate court must enforce the nondiscretionary mandate of ***Rule 32.03*** to have the case transferred to a different county. ***Id.*** at 114, n. 5.

Discussion

The motion to change venue was filed by counsel Younker on March 19, 2013, which was the same day Mr. Chambers was arraigned (LF 1-2, 8; Tr. 43). The motion was not ruled upon; the court continued the case to April 16, 2013 "to hear all pending motions and for trial setting" (LF 2; Tr. 43). On April 16, Mr. Chambers appeared with different counsel, Mr. Evans (LF 2; Tr. 5). The hearing was brief; the court asked, "Is this for

[8] ***Moss v. State***, 10 S.W.3d 508 (Mo. banc 2000) was overruled on other grounds by ***Mallow v. State***, 439 S.W.3d 764, n. 3 (Mo. banc 2014).

setting of 491?" and the prosecutor replied, "Correct." (Tr. 5). The court set the case for a 491 hearing on May 22 (Tr. 5-6).

Rule 32.03 clearly states that if a timely application for a change of venue is filed, the court "immediately shall order the case transferred to some other county." ***Rule 32.03(c).*** The trial court should have ordered the change of venue at the March 19 arraignment when it was filed. If not then, the court certainly should have ordered it by April 16, the next appearance, or any time between March 19 and April 16. Presumably, both the court and counsel Evans either forgot or were unaware that the motion was filed by counsel Younker. And presumably, counsel Evans discovered the motion in his file while preparing the case for trial.[9]

The trial court noted that Mr. Evans called the court on a Sunday, the day before trial, to inform the court that a motion for a change of venue had been filed and never ruled upon (Tr. 45). Counsel requested a change of venue, and the prosecuting attorney suggested that the issue be taken up on the record the morning of trial (Tr. 45). Ultimately, the court ruled that by not bringing the motion to the court's attention at one of the four

[9] Evans told the court that he tried two jury trials a month in June, July, August, September and October; December 9 was the first time this case was set for trial (Tr. 59-60).

prior appearances in the case, Mr. Chambers waived his right to a change of venue (Tr. 47-48).

In ***Bradshaw***, the Western District Court of Appeals addressed the issue of a defendant's waiver of his right to a change of venue. Bradshaw was arraigned on November 24, 1998, and a joint application for change of judge and venue was filed November 25.[10] 81 S.W.3d at 25. At the first appearance before the new judge, the case was set for trial. ***Id.*** at 26. The case was continued from that trial setting as well as two subsequent trial settings, and was finally held on October 1, 1999. ***Id.*** The parties announced ready for trial and began *voir dire*; a jury was selected. ***Id.*** Immediately after the court ordered the jury to be seated, Bradshaw raised the issue of his application for a change of venue. ***Id.*** The trial court denied the motion, finding that it was waived by the conduct of the parties. ***Id.***

On direct appeal, the Western District Court of Appeals affirmed the trial court's ruling, finding that a defendant's failure to object may waive

---

[10] Joint applications for a change of both judge and venue are filed under Rule 32.08, which only permits the judge to sustain the change of judge; the change of venue is ruled upon by the newly-assigned judge. ***Rule 32.08***.

his right to a change of venue. ***Id.*** at 28.[11] The Court ruled that waiver is effective when a defendant proceeds to trial without objection. ***Id.*** The Court found that a defendant "proceeds to trial" when the selection of the jury begins, that is, "with the swearing of the venire at the commencement of the *voir dire* examination." ***Id.*** at 30, *quoting* ***State v. Cullen***, 646 S.W.2d 850, 853 (Mo. App. W.D. 1983).

Mr. Chambers here did not waive his right to a change of venue; the issue was raised well before jury selection began. The trial court had just noted, "I assume the jury is gathering downstairs" when counsel raise the issue of venue, so the venire was not even in the courtroom (Tr. 42). The court noted that Mr. Chambers' counsel notified the court the day before trial – on Sunday – that an application for a change of venue that was filed at Mr. Chamber's arraignment was still pending (Tr. 43-45).

In its application for transfer to this Court, Respondent argued that the Southern District Court of Appeals' decision in Mr. Chambers case overlooked the Rule 32.03(b) requirement that Mr. Chambers provide a notice of the time when his application for change of venue will be presented in court (Resp. App. for Transfer, p. 7). Respondent did not make this argument in the Southern District Court of Appeals, nor did he

[11] This Court denied transfer of the case.

object on this basis in the trial court. At trial, the state argued that Mr. Chambers waived his change of venue request when the case was set for trial in Crawford County (Tr. 47). Respondent may not now raise a new basis for objecting to Mr. Chambers' request for a change of venue that was not presented in the two courts below. ***Rule 83.08(b)***. Moreover, the notice of hearing in an application for a change of venue is not an integral part of the application, and failure to include it is not fatal to the right to a change of venue that is otherwise timely filed and timely served upon the opposing party. *See* ***State v. Cella***, 976 S.W.2d 543, 552 (Mo. App. E.D. 1998), *citing* ***State ex rel. Director of Revenue v. Scott***, 919 S.W.2d 246, 248 (Mo. banc 1996).

The trial court had no discretion to deny the application, and erred in finding that Mr. Chambers "waived" his right to a change of venue by not calling the motion to the court's attention sooner. As required by Rule 32.03, the trial court should have *immediately* granted the motion, and its failure to do so is reversible error. ***Moss***, 10 S.W.3d at 513. Its failure to do so was a violation of Rule 32.03, as well as Mr. Chambers' rights to due process and a fair trial by an impartial jury, guaranteed by the 14th Amendment to the United States Constitution, and Article I, §§ 10 and 18(a) of the Missouri Constitution. This Court should reverse Mr.

Chambers' conviction and remand his case for a new trial after a change of venue.

III.

The trial court abused its discretion in overruling Mr. Chambers' motion for a continuance, because the ruling violated Mr. Chambers' rights to due process, a fair trial, to present a defense, and to the effective assistance of counsel, guaranteed by the 5th, 6th and 14th Amendments to the United States Constitution, and Article I, §§ 10 and 18(a) of the Missouri Constitution, in that the court's ruling was clearly illogical, arbitrary, and unreasonable because the motion was filed three weeks before the first trial setting and counsel demonstrated diligence toward proceeding to trial by asking the court to delay ruling on the motion until after depositions, but the depositions produced testimony by CR inconsistent with his CAC interview, and counsel learned of: undisclosed Children's Division records that might rebut the inference that CR's "bad behavior" was solely the result of sexual abuse; evidence that CR was not taking his prescribed medication during the alleged period; evidence of alleged physical and daily sexual abuse of CR and fire-setting by CR for which counsel required expert assistance; and the names of several witnesses, provided to the court, that counsel still had not located or interviewed – Mr. Chambers was prejudiced by the court's ruling because he was deprived of the opportunity to investigate and

potentially present to the jury this evidence that bore directly on CR's credibility and whether the alleged act was committed.

Facts

On March 19, 2013, Mr. Chambers appeared in person and with counsel, Michael Younker, for arraignment (LF 2). On April 16, Mr. Chambers appeared with different counsel, Mark Evans (LF 2). The case was continued to May 22, 2013 for a § 491.075 hearing (LF 2). The hearing was held as planned, and a June 19, 2013 "case review" was scheduled for the court's ruling on the evidence presented (LF 2). At the June 19, 2013 hearing, the case was scheduled for a jury trial on December 9, 2013; Mr. Chambers' case was third on the trial docket (LF 2). The court also scheduled a November 19, 2013 appearance "to hear all pending motions and for last date to enter negotiated plea" (LF 2).

On November 14, Mr. Chambers filed a notice of deposition of eight state witnesses; the depositions were scheduled for November 21 (LF 10-11). Four days later, Mr. Chambers filed a motion for a trial continuance (LF 12-13). In the motion, Mr. Chambers alleged that the trial of this case was set for December 9, 2013, that Mr. Chambers was facing life in prison and lifetime supervision on parole, and that counsel needed more time to

prepare the case for trial (LF 12). At the scheduled November 19 hearing, counsel Evans informed the court that because depositions were being held in two days, he would not yet ask the court to rule on his pending motion for a trial continuance (Tr. 41). The court asked, "So cause is to remain for trial?" and counsel replied, "Yes" (Tr. 41).

On December 5, four days before the December 9 trial, counsel Evans filed an Amended Motion for Continuance (LF 14-18). In the motion, counsel detailed information revealed in the November 21 depositions that required further investigation by counsel to prepare the case for trial (LF 15-17). Specifically, counsel stated that in a November 26, 2013 interview of a Children's Division employee (an endorsed state witness), counsel learned of the existence of reports relevant to CR's credibility, and the reports could not be released to him for several weeks (LF 15-17, paragraph 5). Counsel also stated that the deposition of CR revealed information that required counsel to obtain CR's counseling records and to consult with an expert regarding the effect of CR's mental health on CR's perception and behavior (LF 17, paragraph 5). Counsel Evans alleged that he could not provide effective assistance of counsel at trial until he obtained these records and investigated them (LF 17). The

motion for continuance was denied at a telephone conference between the parties on December 5 (Tr. 42, 45).

On the morning of trial, December 9, the court made the record that there was a phone conference on December 5, 2014 on Mr. Chambers' motion for a continuance, and the motion was overruled; the court invited counsel to make a record in support of his request for a continuance (Tr. 42, 45). Mr. Chambers filed a Second Amended Motion for Continuance on December 9 (LF 20-24). The motion alleged, in part:

> In a newly received report from September of 2011, there is reference to a report dated March of 2011 alleging failure to give medications to the children, reference to twelve other referrals or investigations concerning the children, six of which defendat [sic] has not received, and that in September of 2011 it was found that the mother of C.L.R had not been giving him his medication as prescribed and had been in jail because some of his medication was missing, that she was "out of it" at a school meeting, and that she was suspected of drug use and requested to take a drug test at the juvenile office. With two file boxes of records concerning C.L.R. to be disclosed bt [sic] the Children's Division after redaction, it is likely that there are other reports which contain facts necessary to an effective defense, and the

leads to witnesses defendant can call. GIVEN THE SCOPE OF THE POTENTIAL EVIDENCE CONTAINED IN THE CHILDREN'S DIVISION RECORDS, DEFENDANT BELIEVES IT IS LIKELY THAT EXCULPATORY EVIDENCE REQUIRED TO BE PROVIDED UNDER MARYLAND V. BRADY[12] EXISTS IN THESE RECORDS.

(LF 22-23, paragraph 5e) (emphasis in original). The motion also alleged that counsel "has not had time since depositions to locate and/or interview potential defense witnesses, some of whom are not identifiable until all of the records are obtained, but are likely to include CD worker Randy Ryno, Rachel Snyder, and Melody Wiggins, among others" (LF 23-24, paragraph 5k).

Mr. Evans spoke at length about what was revealed in his November 21 depositions of state witnesses, and what discovery had still not been provided to the defendant; counsel's argument covers ten pages of transcript (Tr. 48-57). Mr. Evans related that counsel for the Department of Social Services promised to deliver to him two boxes of CR's Children's Division records by November 26, but he only received a fraction of the records (Tr. 48-49). Mr. Evans argued his good-faith belief that the records

[12] ***Brady v. Maryland***, 373 U.S. 83 (1963).

contained evidence relevant to rebut an inference that CR's "bad behavior" was the result of the alleged sexual abuse by Mr. Chambers (Tr. 49-51).

Mr. Evans also argued that he required time to prepare defense rebuttal to CR's deposition testimony that he never told his mother about the abuse because Mr. Chambers was always at home (Tr. 52). Counsel needed time to find, interview, and perhaps subpoena for trial witnesses who could testify that Mr. Chambers managed an apartment building and spent a significant amount of time away from the home, such that CR had the opportunity to speak with his mother privately (Tr. 52). Mr. Evans explained that CR testified to different information in his deposition than in the CAC interview; in the CAC interview, there was little information about when the alleged abuse took place, its duration, or the number of times it happened (Tr. 52). However, in the deposition, CR testified that it was a long period of time and many instances of abuse (Tr. 52). Counsel argued that he needed to consult with an expert regarding the potential physical impact to CR of sexual abuse of the frequency and duration alleged by CR in the deposition (Tr. 52-53). Before the recent deposition, CR had never alleged, for example, that there were "several days a week that there was anal penetration going on every morning" (Tr. 53).

Additionally, counsel argued that CR admitted setting fire to his apartment building and received some treatment for his behavior (Tr. 53). CR alleged that he set fire to the building as a result of abuse by Mr. Chambers (Tr. 53).[13] However in his deposition, CR said he set the fire because Mr. Chambers whipped him and threw his toys in the fireplace (Tr. 53). Counsel argued that CR's fire-setting counseling records may contain information relevant to Mr. Chambers' defense, as would a psychological evaluation allegedly given to CR after his disclosure of this offense (Tr. 53-54). Counsel argued that CR suffered from ADHD and "other mental health issues" for which he took medication and received social security disability, and alleged that CR was not being given his medication because his mother was taking it (Tr. 54). Counsel argued that to defend Mr. Chambers, he needed to know whether CR was getting his medication at the time of the allegation, and what effect that might have had; counsel might need to consult with an expert on this issue as well in order to effectively represent Mr. Chambers (Tr. 54-56).

Counsel also stated that he had information of multiple incidents where CR was untruthful to teachers at the time of the alleged offense (Tr.

[13] CR states in his CAC interview that he had to burn "that place" down because of Mr. Chambers (State's Ex. 4, at approximately minute 12).

56). He argued that he needed to obtain school records of those events, including one school expulsion (Tr. 56). All of these things could cast doubt on CR's credibility and were therefore relevant to Mr. Chambers' defense (Tr. 55-56). Counsel reported that most of this information was learned during the depositions on November 21 (Tr. 58).

The trial court expressed its dissatisfaction with counsel's delaying depositions until twenty days before trial (Tr. 58). The court asked Mr. Evans why he did not do this discovery in "March, April, May, all the way up to the time it was set" (Tr. 58-59). Mr. Evans responded that he represented defendants at two jury trials each month all through that time period, and he had to work on those cases during those times (Tr. 59). The court replied:

> Well I understand that you came into the system here and took over when Mr. Younker left and I think I have been very accommodating with some of the requests for continuances and as I was doing that I realized that I was allowing the tail to wag the dog. I can no longer continue to do that.

(Tr. 59). Mr. Evans explained that at present he was getting fewer new cases so he could concentrate on preparing cases for trial (Tr. 59). He explained that the process of his taking over Mr. Younker's cases began in

April, and when it started, Mr. Evans knew nothing about any of the cases he was to take to trial (Tr. 59-60). He argued that this was the first time this case has been set for trial, and admitted that "if this case had been continued even once before then I couldn't offer you any kind of reasonable argument why we're not ready," but this was the first trial setting (Tr. 60).

The prosecuting attorney objected, arguing that when he created the system of setting a "last date to plea," the plan was to set the case for trial thirty days later and to proceed to trial if there was no plea entered (Tr. 60). The prosecutor acknowledged that Mr. Chambers did not have all of the records he requested, but did not believe they were "pertinent to the particular case at hand" (Tr. 60-61). He argued that as an attorney for the Public Defender, Mr. Evans had to apply for the funds to hire an expert, and just because he wanted one did not mean he would get one (Tr. 61). The court ruled:

> It's the court's expectation when we set the matter for trial that it's going to go to trial and that everybody's going to be working diligently to prepare for trial until the trial date and we set that on June 19th of 2013 for today. Substantial amount of time to get ready

and prepare for trial. The motion for, second amended motion for continuance is overruled and denied.

(Tr. 61).

Following the court's ruling, Mr. Chambers chose to proceed *pro se* because the court's ruling was depriving him of the effective assistance of counsel (LF 38, paragraphs 2-3; Tr. 73). Mr. Chambers told the court that he just received his copies of deposition transcripts the night before trial and was still reading them, "and you expect me to go to court when I've got all that to go through. I don't know that seems pretty strange to me." (Tr. 71). Mr. Chambers told the court that he did not wish to be present at trial, and the case was tried in his absence and without counsel for the defense (Tr. 76-77).

In his motion for judgment of acquittal or a new trial, Mr. Chambers alleged trial court error in overruling his motions for a continuance and his argument in support of those motions on December 9 (LF 37-38, paragraph 2). Mr. Chambers alleged that as a result of the court's ruling, counsel was unable to provide effective assistance of counsel at trial, which resulted in Mr. Chambers' choosing to represent himself (LF 38, paragraphs 2-3). He

alleged that the court's ruling deprived him of his rights to due process, a fair trial, and the effective assistance of counsel (LF 38, paragraphs 2-3).[14]

Standard of Review

The decision to grant a continuance is within the discretion of the trial court. ***State v. Fassero***, 307 S.W.3d 669, 674 (Mo. App. E.D. 2010). This Court will only reverse a trial court's decision if there is a strong showing that the trial court abused its discretion. ***Id.*** The party requesting the continuance has the burden of establishing the court's abuse of discretion and any resulting prejudice. ***Id.*** This Court will reverse the circuit court's denial of a continuance if the trial court abuses its discretion by entering a ruling that is clearly illogical and is arbitrary and unreasonable. ***State v. Sutherland***, 436 S.W.3d 645, 650 (Mo. App. E.D. 2014).

Discussion

In ***State v. Fassero***, the defendant claimed an abuse of discretion for the trial court's denial of his motion for a continuance of trial because he was brought to the county jail only three days before trial and did not have an opportunity to talk with counsel until the night before trial. ***Id.*** at 676. The Eastern District Court of Appeals affirmed Fassero's conviction

[14] U.S. Const., Amends. 5, 6 & 14; Mo. Const., Art. I, §§ 10 & 18(a).

because he did not demonstrate why he was unable to meet with counsel on the two other days, or why counsel was unable to meet with him in his prior place of incarceration. ***Id.*** He also did not demonstrate how the continuance would have aided his defense, or how denial of the continuance prejudiced him. ***Id.***

Mr. Chambers must make a very strong showing that the trial court's abuse of discretion resulted in prejudice. ***Sutherland***, 436 S.W.3d at 650. When a defendant makes a request for a continuance to conduct investigation to counter witness testimony, he must identify a witness who can testify as he desires, or he must assert particular facts to which the unknown witness he hopes to find will testify. ***Id.***, *citing* ***State v. Lucas***, 218 S.W.3d 626, 629-630 (Mo. App. S.D. 2007).

The defendant in ***Sutherland*** did not identify the witness names he claimed to have obtained in a two-hour interview with the victim, nor did he state what their testimony would be and how it would aid his defense. ***Id.*** He also failed to explain to the trial court *how* the victim's story had materially changed, or how further investigation would aid or change his defense. ***Id.*** at 651. The denial of Sutherland's request for a trial continuance was affirmed on appeal.

In ***Lucas***, after representing Lucas for eleven months, defense counsel filed a motion for a continuance just six days before the third trial setting. ***Id.*** at 629. The trial court found that counsel had "ample opportunity to prepare," and his motion for continuance did not identify a witness who could testify as defendant desired even if the continuance were granted. ***Id.*** In short, there was no showing of particular facts known to an absent witness that would have assisted the defendant. ***Id.*** at 630.

By contrast here, counsel Evans had only represented Mr. Chambers for seven months when he requested that the court continue the first and only trial setting in this case (LF 2, 12-13). The motion was filed three weeks before trial (LF 3). Although counsel had filed the motion the day before, he told the court at a November 19 hearing that the court could withhold ruling on the motion until after counsel finished depositions scheduled for November 21 (Tr. 41). Presumably, counsel would have continued to trial as scheduled if, after taking the depositions, he believed the case could proceed to trial. However, this was not the case; after the depositions, counsel filed another motion to continue, outlining what he

had learned in the depositions that required further investigation to prepare a defense (LF 14-18, Tr. 58).[15]

Counsel outlined in detail in his December 5 and December 9 continuance motions the information that required further investigation to prepare a defense, even naming the witnesses (LF 14-18, 20-24, paragraph 5k; Tr. 57). He argued for what consumed ten pages of transcript regarding the evidence he discovered in the depositions that required further inquiry to effectively represent Mr. Chambers at trial, including inconsistencies in the victim's deposition testimony compared to his CAC interview (Tr. 48-57, 52). He pointed out to the court that this was a very serious case and this was the first trial setting; he also noted that his trial preparation in this case was severely limited by the fact that he had tried two cases a month in June, July, August, September, and October, a fact which neither the prosecutor nor the court disputed (Tr. 48, 59). And yet the court's only basis for denying Mr. Chambers' request was that the court had grown tired of "allowing the tail to wag the dog" and that when

[15] A subpoena duces tecum for records from the Children's Division had to be moved to November 26 (Tr. 48). When the records were finally delivered, they were incomplete; the state acknowledged as much (Tr. 28-29, 61).

a case is set for trial, the court expects that everyone work diligently to prepare for it; counsel had "substantial amount of time to get ready and prepare for trial," so his motion was overruled (Tr. 59, 61).

The Fifth and Fourteenth Amendments entitle criminal defendants to obtain material evidence relating to either guilt or punishment. ***Brady v. Maryland***, 373 U.S. 83, 87 (1963). A trial court abuses its discretion when it fails to grant a continuance necessary for the defense to prepare for trial. ***State v. McIntosh***, 673 S.W.2d 53, 54-55 (Mo. App. W.D. 1984). An abuse of discretion occurs when a court's ruling results in fundamental unfairness to the defendant. ***State v. Grant***, 784 S.W.2d 831, 835 (Mo. App. E.D. 1990). To show that a court's refusal to grant a continuance was an abuse of discretion, Mr. Chambers must show that the denial was prejudicial. ***State v. Smith***, 292 S.W.3d 595, 600 (Mo. App. S.D. 2009).

In ***Smith***, the Southern District Court of Appeals upheld the trial court's overruling Smith's motion for a trial continuance to obtain evidence that would allow him to impeach a witness. ***Id.*** Based on a review of the underlying facts of the case, the ***Smith*** Court found that the evidence Smith sought to obtain with his continuance was impeachment evidence on a collateral issue; it had no bearing on whether Mr. Smith committed the alleged act. ***Id.*** at 600-601. The Court noted, "Where

testimony of an absent witness would not bear directly on the guilt or innocence of a defendant, but would simply impeach the testimony of another witness, it is not error to deny a continuance." ***Id.***, *quoting* ***State v. Brown***, 762 S.W.2d 471, 475 (Mo. App. E.D. 1988). But where a defendant requests a trial continuance in order that he may procure material evidence, and the failure to procure that evidence was not the result of an intent to delay the administration of justice, it is an abuse of discretion for the trial court to deny the continuance. ***State v. Sherrell***, 198 S.W. 464, 466 (Mo. App. Spr. D. 1917).

The trial court abused its discretion here in denying Mr. Chambers' request for a continuance of his first trial setting in order to further investigate the case, obtain records relevant to the credibility of the alleged victim, obtain expert opinion about material facts, and provide effective assistance of cousel for Mr. Chambers' defense. The trial court's ruling was clearly illogical, arbitrary and unreasonable, and Mr. Chambers was prejudiced by the ruling because he was forced to proceed to trial without adequately-prepared counsel and the time necessary to investigate and prepare a defense. The court's ruling deprived Mr. Chambers of his rights to due process and a fair trial, as well as his right to the effective assistance

of counsel;[16] his conviction should be reversed, and his case remanded for a new trial.

[16] U.S. Const., Amends. 5, 6 & 14; Mo. Const., Art. I, §§ 10 & 18(a).

CONCLUSION

There was insufficient evidence presented at trial to prove the act charged, and Mr. Chambers' conviction should therefore be reversed and Mr. Chambers discharged (Point I). In the alternative, Mr. Chambers' conviction should be reversed and his case remanded for a new trial in a new venue because the trial court erred in overruling his application for a change of venue and ordered that he proceed to trial in Crawford County (Point II). Mr. Chambers' case also merits a remand for a new trial because the trial court abused its discretion in overruling counsel's motion for a continuance of the first trial setting (Point III).

Respectfully submitted,

/s/ Margaret M. Johnston

Margaret M. Johnston, MOBar #45913
Attorney for Appellant
Office of State Public Defender
Woodrail Centre
1000 West Nifong
Building 7, Suite 100
Columbia, MO 65203
(573) 777-9977
FAX (573) 777-9974
maggie.johnston@mspd.mo.gov

CERTIFICATE OF COMPLIANCE AND SERVICE

I, Margaret M. Johnston, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2007, in Book Antiqua size 13 point font, which is no smaller than Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 11,240 words, which does not exceed the 31,000 words allowed for an appellant's brief.

On this 3rd day of September, 2015, electronic copies of Appellant's Substitute Brief and Appellant's Substitute Brief Appendix were placed for delivery through the Missouri e-Filing System to Dora Fichter, Assistant Attorney General, at Dora.Fichter@ago.mo.gov.

/s/ Margaret M. Johnston

Margaret M. Johnston